2018

Steven Eric Graham, Plaintiff/Appellant, v. Albertson's LLC., Defendant/Appellee : Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

STEVEN ERIC GRAHAM, Plaintiff/Appellant, v. Albertson's, LLC., Defendant/Appellee.	**BRIEF OF APPELLEE** Appellate Case No. 20180885-SC ORAL ARGUMENT REQUESTED

On Appeal from an interlocutory order of the Third Judicial District Court, Salt Lake County, the Honorable Heather Brereton, District Court No. 180900781

Kenneth B. Grimes
Law Offices of Kenneth B. Grimes
480 East 400 South, Suite 203
Salt Lake City, Utah 84111
Telephone: 801-359-4212
kglawyerutah@gmail.com

Attorney for Graham-Appellant Steven Eric Graham

Mark A. Wagner
Parsons Behle & Latimer
201 S Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: 801-532-1234
mwagner@parsonsbehle.com

Attorneys for Defendant-Appellee Albertson's, LLC

LIST OF PARTIES

Plaintiff/Appellant	**Represented by:**
Steven Eric Graham	Kenneth B. Grimes
Defendant/Appellee	**Represented by:**
Albertson's, LLC	Mark A. Wagner

TABLE OF CONTENTS

ADDENDUM

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

In this case, plaintiff/appellant Steven Graham ("**Graham**") seeks to avoid the procedure and remedy established by the Utah legislature for complaints of alleged retaliatory termination in violation of the Utah Occupational Safety and Health Act ("**UOSH Act**") in order to pursue a common-law claim for wrongful discharge in violation of public policy. He does so because he "prefer[s] . . . the claims and remedies which are available in [tort]" over those available under the UOSH Act. (Declaration of Steven Eric Graham, R. 0075-0077, ¶ 12.)

Graham's preference is irrelevant in this case. The Utah legislature has already addressed the precise injury for which Graham seeks to recover in tort and specified a detailed scheme for the handling of complaints of such an injury. As a result, Graham's wrongful discharge claim is properly analyzed using the indispensable element test, which this Court adopted in *Retherford v. AT&T Communications of Mountain States, Inc.*, as "the correct analytical model for determining whether a statutory cause of action forecloses a common law remedy." 844 P.2d 949, 963 (Utah 1992). The district court correctly analyzed Graham's wrongful discharge claim under the indispensable element test and determined that, under that test, Graham's claim is preempted by the UOSH Act. (R. 0587-0588, at ¶6.) Graham omits any mention in his Brief of Appellant ("**Opening Brief**") of the district court's analysis and rejection of

his claim under the indispensable element test. But the district court's analysis of his claim under that test is dispositive of both his claim and this appeal.

In his Opening Brief, Graham challenges only the portion of the district court's ruling holding that his wrongful discharge claim is preempted under the more generally applicable field preemption analysis applied by this Court in *Gilger v. Hernandez*, 2000 UT 23, and *Gottling v. P.R. Incorporated*, 2002 UT 95. As set forth below, however, the district court also correctly concluded that Graham's wrongful discharge claim is preempted under a field preemption analysis, and Graham's arguments to the contrary are without merit. Accordingly, this Court should affirm the order of the district court dismissing Graham's wrongful discharge claim as preempted by the UOSH Act.

STATEMENT OF THE ISSUE

Issue Did the trial court commit reversible error by granting Albertson's partial summary judgement dismissing Graham's claim of wrongful discharge in violation of public policy as preempted by the UOSH Act, including but not limited to Section 203 thereof ("**Section 203**"). Utah Code § 34A-6-203 (copy attached hereto as Addendum Item 1).

Standard of Appellate Review A ruling on summary judgment is reviewed for correctness without deference to its legal conclusions. *Gottling v. P.R. Incorporated*, 2002 UT 95, ¶ 5.

Preservation The issue on appeal was directly presented to and decided by the district court in its Order Denying Plaintiff's Motion for Partial Summary Judgment, Granting Defendant's Cross-Motion for Partial Summary Judgment, and Denying Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth. (R. 585-589.)

STATEMENT OF THE CASE

I. FACTS OF THE CASE

On or about December 6, 2016, Graham suffered a minor injury to his back while lifting a bag of potatoes at Albertson's Distribution Center in Salt Lake City. (R. 0002 ¶ 7, 0115, 0132, 0272, 0322-0324, 0365-0366.) Graham reported his injury to his supervisor, who completed an injury report with Graham and assisted Graham in obtaining medical evaluation. (R. 0115, 0133, 0477 ¶7.) Thereafter, Albertson's covered Graham's medical costs through workers' compensation, and gave him temporary alternative work within his work restrictions. (R. 0115, 0133, 0477-481 ¶¶ 7-8, 013-22, 0484-0485 ¶¶ 7-11.)

A little more than two months later, Graham's employment with Albertson's was terminated. (R. 0115.) The parties dispute the reason for Graham's termination. Albertson's contends that Graham's termination, which was originally initiated by Graham as a voluntary termination for personal reasons and to focus on school, ultimately was a result of a

combination of factors, including various work-related incidents and dishonesty by Graham. (R. 0289-0294 ¶¶ 9-19.) Graham contends he was terminated for reporting his injury to Albertson's. (R. 0007-0008.)

II. PROCEDURAL HISTORY

About three months later, on June 8, 2017, Graham filed a complaint with the Division of Occupational Safety and Health ("**Division**") pursuant to Section 203 alleging that Albertson's had terminated him in retaliation for reporting a work-related injury. (R. 0076.) The Division investigated Graham's complaint and issued an Order that the evidence did not support a finding that Albertson's had terminated Graham in violation of the UOSH Act. *Id.* On November 6, 2017, Graham administratively appealed this Order to the Labor Commission's Division of Adjudication. *Id.* That appeal is pending.

On January 29, 2018, Shortly after he filed his administrative appeal, Graham filed a Complaint against Albertson's in Third District Court. (R. 0001-0014.) In his Complaint, Graham asserts a claim for wrongful discharge in violation of public policy based on allegations that Albertson's terminated him in retaliation for having reported a workplace injury to Albertson's, in violation of the public policy against retaliatory discharge embodied in Section

203.[1] *Id.* (R. 7-8.) Shortly after Albertson's filed its Answer and the parties exchanged initial disclosures, Graham filed a motion for partial summary judgment seeking a ruling that his wrongful discharge claim is not preempted by the UOSH Act. (R. 0053-0062.) Graham also filed a declaration in support of his motion in which he represented to the district court that "[d]ue to the limited procedures and remedies which are available for claimants under Utah Code §34A-6-203, I prefer to pursue the claims and remedies which are available in the present action in lieu of my pending claims in the Utah Labor Commission." (R. 0075-0077, ¶ 12.) Graham further informed that court that "[s]hould this Court decide to grant my present Motion, it is my intention to voluntarily dismiss my proceeding in the Utah Labor Commission." (R. 0075-0077, ¶ 13.)

Albertson's opposed Graham's motion, (R. 0114-0131), and filed a cross-motion for partial summary judgement seeking a ruling that Graham's wrongful discharge claim is preempted by the UOSH Act, including but not limited to Section 203. (R. 0132-0136.) On July 30, 2018, Graham filed a Notice of Supplemental Authority, arguing that Utah Administrative Code R614-1-10.L.3-5 (copy attached hereto as Addendum Item 3), reflects a

[1] Graham's Complaint also assert claims for purported breach of contract and breach of the implied warranty of good faith and fair dealing. (R. 0009-0011.) These claims remain pending in the district court.

legislative intent that the administrative remedy established by Section 203 not be the exclusive remedy for retaliatory termination in violation of the UOSH Act. (R. 0212-0214.) On September 21, 2018, Graham filed a Second Notice of Supplemental Authority, in which he argued that Utah Code section 34A-6-110 (copy attached hereto as Addendum Item 2) also reflects a legislative intent that the UOSH Act not preempt claims of wrongful discharge in violation of public policy. (R. 0541-0542.)

On October 12, 2018, the district court entered an order ruling that Graham's claim of wrongful discharge in violation of public policy is preempted by the UOSH Act, including but not limited to Section 203. (R. 0585-0589) (copy attached hereto as Addendum Item 4.) The district court based its ruling on both general field preemption principles (R. 0586-0587, at ¶¶ 1-5) and on the more specialized "indispensable element" test adopted by this Court in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). (R. 0587-0588, at ¶ 6.)

In applying general field preemption principles, the district court ruled that a preemptive intent is implied by the structure and purpose of the UOSH Act. (R. 0586-0587, at ¶ 3.) The district court explained that in enacting the UOSH Act, "the legislature put in place a comprehensive piece of legislation to provide for the safety and health of workers and provided a coordinated plan to establish standards to do so," including "procedures, a scheme of regulation,

and a bureaucratic system to implement its aims in a timely and cost-effective approach." *Id.* The district court further explained that employee retaliation complaints to the Division "address the concerns not only of individual employees but also the broader purpose of providing for the safety and welfare of all workers through the broader regulatory structure of the UOSH Act," and that allowing common-law tort claim outside the process established by the UOSH Act "runs counter to the purpose of the UOSH Act in that it could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided for under the UOSH Act." (R. 0587, at ¶5.)

In reaching its conclusion, the district court expressly noted Graham's argument that a non-preemptive legislative intent is indicated by Utah Administrative Code R614-1-10.L, but rejected that argument based on a plain reading of the rule, which on its face applies only to arbitration and other agency proceedings. (R. 0587, at ¶ 4.) The district court did not explicitly address the merits of Graham's argument about Utah Code section 34A-6-110, but it expressly acknowledged that Graham had "filed Plaintiff's Second Notice of Supplemental Authority," and affirmatively stated that, in issuing its order, it had "considered the pleadings and submissions of the parties, the arguments of counsel, and the relevant law." (R. 0586.)

The portions of the district court's order applying field preemption principles are referred to and quoted in Graham's Opening Brief. Opening Brief, at 6-7. The portion of the district court's analysis and ruling based on the indispensable element test, which is not set forth or even acknowledged in Graham's Opening Brief, is set forth below:

> The Court further finds that when it analyzes plaintiff's common-law claim in this action, the UOSH Act provides the public policy supporting his common-law claim, and it establishes a procedure and remedy to address his claim, which is retaliation or discharge for reporting a workplace injury in violation of the UOSH Act. As such, the Court finds that the claim at issue comes within the scope of the UOSH Act's preemptive effect. The Court comes to this conclusion based on the indispensable element test set forth in *Retherford v. AT&T Communications* of *Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). In applying this test, preemption depends on the nature of the injury for which the plaintiff makes the claim. Here, in Utah Code section 34A-6-203, the UOSH Act specifically addresses retaliation or discharge as a result of reporting a workplace injury, the very injury claimed by plaintiff in this action. The Court finds that the UOSH Act establishes a procedure for reporting and investigating a claim of retaliation and discharge, a forum to issue a decision or order, a remedy, and a procedure for review and appeal of that order. Further, in claiming discharge in violation of public policy in his tort claim, plaintiff relies on the UOSH Act as the statement of public policy. In the absence of the UOSH Act, plaintiff would be unable to make out his common-law claim. As such, the Court finds that the harm the UOSH Act addresses is an indispensable element of plaintiff's tort cause of action and, therefore, the UOSH Act preempts plaintiff's common-law claim here.

(R. 0587-0588, at ¶6.)

On October 2, 2018, Graham filed a Motion to Certify Ruling Pursuant to Rule 54(b). (R. 5046-0552.) The district court denied that Motion on December 17, 2018. (R. 0679-0681.)

On November 1, 2018, Graham filed a Petition for Permission to Appeal with this Court. (R. 0620-0634.) On December 26, 2018, this Court granted that Petition. (R. 0794.)

On December 7, 2018, Graham filed a Motion for Leave to Amend Complaint. (R. 0642-0648.) Among other things, Graham sought to amend his Complaint to assert a claim for wrongful discharge in violation of public policy based on allegations that Albertson's retaliated against him, including terminating his employment, ***not*** for exercising a right under the UOSH Act, but "for claiming and receiving workers' compensation benefits . . . ." (R. 0642-0643.) Albertson's opposed Graham's Motion to Amend as untimely without any justification offered for delay, as unduly prejudicial, and as an attempted end run around the district court's dismissal of his wrongful discharge claim based on the UOSH Act. (R. 0684-0791.)

On December 27, 2018, Graham filed a Motion to Stay Proceedings Pending Decision on Appeal. The district court granted that motion on February 4, 2019.[2]

[2] As a result, Graham's Motion for Leave to Amend Complaint remains pending in the action below.

III. DISPOSITION BELOW

On October 12, 2018, the district court entered an order ruling that Graham's wrongful discharge claim is preempted by the UOSH Act, including but not limited to Section 203. (R. 0585-0589.) Accordingly, the district court denied Plaintiff's Motion for Partial Summary Judgment and granted Albertson's Cross-Motion for Partial Summary Judgment, dismissing Graham's claim for wrongful discharge in violation of public policy.

As noted above, on December 26, 2018, this Court granted Graham's Petition for Permission to Appeal. (R. 7094.)

SUMMARY OF THE ARGUMENT

The district court correctly ruled that Graham's wrongful discharge claim is preempted by the UOSH Act under the indispensable element test. The indispensable element test was adopted by this Court in *Retherford v. AT&T Communications of Mountain States, Inc.*, as "the correct analytical model for determining whether a statutory cause of action forecloses a common law remedy." 844 P.2d 949, 963 (Utah 1992). Under this test, preemption depends on "'the nature of the injury for which [the] plaintiff makes [the] claim, not the nature of the defendant's act which the plaintiff alleges to have been responsible for that injury.'" *Id.* at 965 (citations omitted). The indispensable element test has two prongs. Under the first prong, a court determines the nature of the injury the statute in question is designed to address. Under the

second prong, a court determines whether the injury the relevant statute is designed to address supplies an indispensable element of the cause of action being examined. *Id.* at 965-966. If it does, that cause of action is preempted. *Id.* at 966.

In this case, the district court properly applied the indispensable element test and held that Graham's wrongful discharge claim is preempted by the UOSH Act. The district court first correctly determined that the nature of the injury that the UOSH Act is designed to address is "retaliation or discharge as a result of reporting a workplace injury, the very injury claimed by [Graham] in this action." (R. 0587-0588, at ¶6.) The district court next correctly determined that discharge in retaliation for reporting a workplace injury is an indispensable element of Graham's claim for wrongful discharge in violation of public policy. *Id.* To prove his claim, Graham must prove that his alleged discharge contravenes a "clear and substantial public policy" of the State of Utah. *Retherford*, 844 P.2d at 966. The district court noted that "in claiming discharge in violation of public policy . . . , [Graham] relies on the UOSH Act as the statement of public policy. In the absence of the UOSH Act, plaintiff would be unable to make out his common-law claim." (R. 0587-0588, at ¶6.) According, the district court properly concluded that "the harm the UOSH Act addresses is an indispensable element of [Graham's] tort cause of action and, therefore, the UOSH Act preempts [Graham's] common-law claim here." *Id.*

The district court also correctly ruled that Graham's wrongful discharge claim is preempted under the more generally applicable field preemption analysis applied by this Court in *Gilger v. Hernandez*, 2000 UT 23, and *Gottling v. P.R. Incorporated*, 2002 UT 95. The district court first correctly noted that although the UOSH Act does not contain an express exclusive remedy provision, "a preemptive intent is implied by the structure and purpose of the UOSH Act." (R. 0587, at ¶ 3.) The purpose of the UOSH Act is to "put in place a comprehensive piece of legislation to provide for the safety and health of workers and provide[] a coordinated plan to establish standards to do so." *Id.* To further that purpose, "[t]he UOSH Act establishes standards, procedures, a scheme of regulation, and a bureaucratic system to implement its aims in a timely and cost-effective approach." *Id.*

The district court further found that allowing Graham's wrongful discharge claim could stand as an obstacle to accomplishment and execution of the full purpose and objectives of the UOSH Act. (R. 0587, at ¶ 5.) The district court explained that allowing a wrongful discharge claim for retaliatory termination under the UOSH Act "could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided for under the UOSH Act, and that claims under the UOSH Act address the concerns not only of individual employees but also the broader purpose of providing for the safety and welfare of all workers through the

broader regulatory structure of the UOSH Act." *Id.* This conclusion is a matter of common sense, and is further supported in this case by Graham's own representations to the district court that he desired to pursue his wrongful discharge claim over an administrative claim under the UOSH Act because he "prefer[s] . . . the claims and remedies which are available in [tort]" over those available under the UOSH Act, and that if the district court permitted him to do so, it was his intention to voluntarily dismiss his pending administrative proceeding. (Declaration of Steven Eric Graham, R. 0075-0077, ¶¶ 12-13.) Discouraging employees from filing complaints with the Division could impede the Division's ability to execute the full purpose and objectives of UOSH Act because it would decrease information coming to the Division about conduct potentially indicative of unsafe or unhealthy workplaces or that interferes with Division's ability to perform its statutory mandates of conducting workplace inspections and investigating worker injuries, Utah Code § 34A-6-301; enforcing rules requiring employers to report workplace injuries to the Division, *id.*; issuing citations for violations, *id.* § 34A-6-302; and petitioning district courts to restrain dangerous workplace conditions or practices. *Id.* § 34A-6-305.

Graham's arguments against field preemption are without merit. Graham argues that the district court "failed to allocate the burden of proof to [Albertson's]" because the district court's order does not expressly recite that

Albertson's had the burden of proof in establishing preemption. Opening Brief at 11-12. Yet it is clear from the face of the district court's order and the memoranda submitted by Albertson's in connection with the parties' cross-motions for partial summary judgment that Albertson's met its burden of proof, as each of the grounds relied on by the district court were argued by Albertson's. Graham also argues that the district court's ruling "is based upon an unsupported factual assumption that workers will forego an administrative claim under the UOSH Act to pursue their common law remedy." Opening Brief at 16. But, as noted above, the conclusion that allowing persons to pursue tort claims with more generous available damages and a longer limitations period would discourage at least some of them from making administrative complaints to the Division is not only a matter of common sense, it is supported by Graham's own stated intent in this case.

Graham's argument that the district court did not properly consider his "evidence" against preemption is likewise without merit. Opening Brief at 17-21. In its order, the district court expressly discussed the administrative rule cited by Graham in his first Notice of Supplemental Authority and found it inapplicable on its face. (R. 0587, at ¶ 4.) And, while the district court's order does not discuss the statutory provision cited by Graham in his Second Notice of Supplemental Authority, it explicitly refers to that Second Notice of Supplemental Authority and expressly states that the district court considered

all of the parties' submissions in arriving at its ruling. (R. 0586.) Further, like the administrative rule cited by Graham, the statutory provision he cites is inapplicable on its face. The language and context of that statutory provision shows that it was intended to preserve existing law relating to physical or mental injuries on the job.

Finally, Graham's argument that the limited remedies available under Section 203 "establish an inference against pre-emption" also fails. *See* Opening Brief at 22. Graham does not support this argument with citation to any supporting legal authority, and Utah law on preemption is decidedly to the contrary. Indeed, this Court found the common law claims in both *Retherford* and *Gottling* were preempted notwithstanding that the remedies under the relevant statute were limited (in the case of *Retherford*) or not available at all (in the case of *Gottling*).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT GRAHAM'S CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IS PREEMPTED BY THE UOSH ACT.

The district court correctly ruled that Graham's claim for wrongful discharge in violation of public policy based on the UOSH Act is preempted by the UOSH Act under both general field preemption principles and under the indispensable element test set forth in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). Because the indispensable

element test governs in this case and is dispositive of Graham's claim, it is addressed first below.

A. Graham's Claim Is Preempted Under the "Indispensable Element" Test Adopted by *Retherford*.

In his Opening Brief, Graham omits to mention the district court's ruling that his wrongful discharge claim is preempted under the indispensable element test adopted by this Court in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992).[3] However, in *Retherford*, this Court squarely held "that the indispensable element test is the correct analytical model for determining whether a statutory cause of action forecloses a common law remedy." *Id.* at 963. This is the precise determination made by the district court in this case and the precise question presented in this appeal.

In *Retherford*, the plaintiff claimed her former employer terminated her in retaliation for complaining of sexual harassment. *Id.* at 957. Rather than filing an administrative charge of discrimination under the Utah Anti-Discrimination Act ("**UADA**"), Retherford sued her former employer for wrongful discharge in violation of public policy because "she hope[d] to avoid

---

[3] This Court should affirm the district court's ruling for this reason alone. *See Roach v. Los Angeles & S.L.R. Co.*, 74 Utah 545, 280 P.2d 1053, 1055 (1929) ("It is well settled in this jurisdiction that questions not assigned, or, though assigned, but not briefed or discussed, will not be considered."); *iDrive Logistics, LLC v. Integracore LLC*, 2018 UT App. 40, ¶ 76 (appellate court rejects challenge to district court ruling where the appellant fails to address in its arguments on appeal the basis of the district court's ruling).

[the UADA's] provisions and pursue her common law remedies. . . ." [4] *Id.* at 961. Her former employer moved to dismiss this claim on the ground, among others, that it was preempted by the UADA (and Title VII). The trial court converted the motion into a motion for summary judgment, and granted it.

In reviewing the trial court's dismissal of this claim, the question as framed by the *Retherford* Court was, "Does the [UADA's] exclusive remedy provision preempt common law causes of action based on the same facts necessary to prove a cause of action under the statute, including common law causes of action for discharge in violation of public policy[?]" *Id.* at 959. After examining different approaches used by courts in other jurisdictions to answer such a question, the *Retherford* Court held "that the indispensable element test is the correct analytical model for determining whether a statutory cause of action forecloses a common law remedy." *Id.* at 963.

The "indispensable element test" requires a court to "begin with the task of determining what injuries [the statute] is designed to address," and then take "the next step … to determine whether [those injuries supply] an indispensable element of any of [the plaintiff's] causes of action." *Id.* at 965-66. If they do, the claim is preempted. *Id.*

---

[4] This is precisely what Graham admits he seeks to do in this case. (R. 0075-0077, ¶¶ 12- 13.)

Applying this test to Retherford's public policy claim, this Court first concluded that the UADA was designed, among other things, to address "all manner of employment discrimination," including retaliation. *Id.* Having made this determination, this Court next queried whether "employer retaliation supplies an indispensable element of" Retherford's public policy claim. *Id.* This Court answered that question in affirmative, and held that that Retherford's public policy claim was preempted. This Court explained as follows:

> The only possible source in Utah's statutes or constitution for a clear and substantial public policy allegedly violated by Retherford's discharge is the UADA's prohibition of retaliation for good faith complaints of employment discrimination. . . . [W]e find that in the absence of this public policy declaration, Retherford would be unable to allege an action for this tort. ***Simply put, if there were no UADA policy against retaliation, there could be no tort for discharge in violation of this public policy***.

Id. (emphasis added).

Graham's public policy claim is materially indistinguishable from the public policy claim in *Retherford*. The plain purpose of Section 203, on which Graham relies for a public policy, is to prohibit retaliation against an employee who exercises a right under the UOSH Act.[5] In other words, under the first

---

[5] In relevant part, Section 203 provides as follows:

> (1) A person may not discharge or in any way retaliate against an employee because the employee:
>
> . . .

prong of the indispensable element test, retaliation for exercising a right under the UOSH Act is the injury Section 203 was designed to address. Further, under the second prong of the indispensable element test (and just as in *Retherford*), retaliation is an indispensable element of Graham's wrongful discharge claim. The only possible statutory source for the public policy against retaliation that Graham advocates is Section 203. In the absence of Section 203's prohibition against retaliation, Graham would not even be able to allege a public policy claim. "Simply put, if there were no [UOSH Act] policy against retaliation, there could be no tort for discharge in violation of public policy." *Retherford*, 844 P.2d at 996.

Thus, under the indispensable element test, the UOSH Act preempts Graham's public policy claim. *See also* *Johnson v. E. A. Miller, Inc.*, 172 F.3d 62 (10th Cir. Feb 25, 1999) (unpublished), *cert. denied*, 528 U.S. 1004 (1999) (dismissing common law wrongful discharge claims as preempted by Section 203 and the UADA, stating: "[A]ny 'public policy' actions which are based on a statutory cause of action are preempted.") The district court correctly applied the indispensable element test to this case, ruling as follows:

> The Court further finds that when it analyzes plaintiff's common-law claim in this action, the UOSH Act provides the public policy

---

> (c) exercises a right granted by this chapter on behalf of the employee or others.

Utah Code § 34A-6-203(1).

> supporting his common-law claim, and it establishes a procedure and remedy to address his claim, which is retaliation or discharge for reporting a workplace injury in violation of the UOSH Act. As such, the Court finds that the claim at issue comes within the scope of the UOSH Act's preemptive effect. The Court comes to this conclusion based on the indispensable element test set forth in *Retherford v. AT&T Communications* of *Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). In applying this test, preemption depends on the nature of the injury for which the plaintiff makes the claim. Here, in Utah Code section 34A-6-203, the UOSH Act specifically addresses retaliation or discharge as a result of reporting a workplace injury, the very injury claimed by plaintiff in this action. The Court finds that the UOSH Act establishes a procedure for reporting and investigating a claim of retaliation and discharge, a forum to issue a decision or order, a remedy, and a procedure for review and appeal of that order. Further, in claiming discharge in violation of public policy in his tort claim, plaintiff relies on the UOSH Act as the statement of public policy. In the absence of the UOSH Act, plaintiff would be unable to make out his common-law claim. As such, the Court finds that the harm the UOSH Act addresses is an indispensable element of plaintiff's tort cause of action and, therefore, the UOSH Act preempts plaintiff's common-law claim here.

(R. 0587-0588, at ¶6.)

This Court should affirm the district court's order.

B. The District Court Also Correctly Ruled that Graham's Claim Is Preempted by the UOSH Act Under the Doctrine of Field Preemption.

Even if this case were not governed by *Retherford*, which it is, it would still fail as a matter of law because, as the district court also correctly observed, the purpose and structure of the UOSH Act demonstrate the Utah legislature's

intent to preempt the field of law applying to claims of discharge in retaliation for exercising a right under the UOSH Act.[6]

1. The UOSH Act Creates a Scheme of Statutory Regulation so Pervasive as to Make Reasonable an Inference of Preemptive Intent as to Conduct Explicitly Addressed by the UOSH Act.

This Court first addressed "field preemption" in *Gilger v. Hernandez*, 2000 UT 23. In *Gilger*, this Court was asked to decide whether Utah's Dramshop Act preempted a common law negligence claim against a social host

---

[6] That the indispensable element test of *Retherford* governs in this case is made further clear by this Court's description of this test in its subsequent decisions in *Gilger v. Hernandez*, 2000 UT 23, and *Gottling v. P.R. Incorporated*, 2002 UT 95. In *Gilger*, this Court explained that the indispensable element test

> applies to a specific type of preemption: where the statute at issue offers a remedy for a specific type of injury caused by an act of the defendant and where the asserted common law causes of action, while based on the same facts, offer a remedy for a potentially different injury based on those same facts. In such situations, we have held that the intent to preempt is determined by "the nature of the injury for which [the] plaintiff makes [the] claim, not the nature of the defendant's act which the plaintiff alleges to have been responsible for that injury." (internal citations omitted).

Gilger, 2000 UT 23, ¶ 10. The *Gilger* Court further explained that it did not face that narrow type of preemption claim in the case before it, as the Dramshop Act did not offer a statutory remedy to the plaintiff in that case; therefore, *Retherford* was inapplicable, "***although it remains fully appropriate in situations for which it was designed***." *Id.* (emphasis added). In *Gottling*, this Court again distinguished *Retherford* on like grounds, and reaffirmed its applicability to cases involving a determination whether a statutory cause of action forecloses a common law remedy. 2002 UT 95, ¶ 9, n.1.

As noted above, this case presents the same situation as *Retherford*, because the UOSH Act offers a remedy for the precise injury for which Graham seeks to recover through a common-law tort claim for wrongful discharge.

who supplied beer, rather than liquor, to a minor guest who then stabbed another guest. This Court found that although the Dramshop Act did not have an express preemption provision, and did not apply to a social host who supplied beer (as opposed to liquor) to a minor, it nonetheless preempted a negligence claim because that Act preempted the entire field of negligence liability for the supply of alcohol to one who then causes harm. *Id.* at ¶¶ 9-11. This Court found evidence of the Dramshop Act's preemptive intent in the fact that, "The Act evidences an overall scheme of regulation of liability for liquor providers. Its very comprehensiveness suggests a purpose and intent to preempt inconsistent common law." *Id.* at ¶ 12. This Court further commented,

> Although the matter is not without doubt, it appears on balance that the policy reflected in the careful legislative designations of those liable and those not liable under the Act cannot coexist with the imposition by courts of different standards of care and damage exposure for some of those the legislature has decided should not be liable under the Act. We conclude that the common law of negligence is preempted insofar as it may impose liability for acts that the Dramshop Act reaches. Therefore, plaintiffs' common law negligence liability claims based on Hernandez's serving alcohol to the minor Martinez, conduct covered by the Act, were properly dismissed.

Id. at ¶ 13.

Two years later, this Court again addressed field preemption in *Gottling v. P.R. Incorporated*, and concluded that the UADA was intended to preempt the field of employment discrimination claims, including claims against

employers too small to be covered by the UADA even though this conclusion left the plaintiff without any remedy. 2002 UT 95, ¶¶ 9-13. In reaching this conclusion, the *Gottling* Court explained that the question was "if the legislature, with its broad law-making power, intended to exercise that power and to occupy the field in such a way as to exclude the contemporaneous application and development of the common law." *Id.* at ¶ 8 (quoting *Gilger*, 2000 UT 23, at ¶ 11). In answering this question, a court should first look for language in the statute that reveals an explicit intent to preempt common law. If such language is not present, then a court should examine the statute's structure and purpose to determine if they reveal a clear, but implicit, preemptive intent. *Id.* Examining the UADA, the *Gottling* Court found an explicit intent to preempt the common law in the UADA's exclusive-remedy provision. *Id.* at ¶ 9. The *Gottling* Court went further, however, and noted that its conclusion would be the same even in the absence of such language, based on its structure and purpose. The *Gottling* Court explained,

> Even if the UADA lacked an explicit statement of preemptive intent, our holding that it preempts common law remedies for employment discrimination would not change because a clear preemptive intent can be implied from the statute's structure and purpose. The UADA was designed "to prohibit discrimination in employment," and it utilizes a variety of tools to accomplish that goal. Not only does it create an administrative remedy for those alleging to have been discriminated against by large employers, the UADA also provides a remedy to those discriminated against by employment agencies, labor organizations, and persons who aid, incite, compel, or coerce to commit "discriminatory or

> prohibited employment practices." In addition, the UADA "creates a substantial bureaucratic system to implement its aims." It establishes both the Utah Division of Anti–Discrimination and Labor and the Utah Anti–Discrimination and Advisory Council. It delegates the power to receive, investigate, and pass upon complaints. It directs that the "existence, character, causes, and extent of" employment discrimination be investigated and studied. It provides for the formulation of plans for elimination of discrimination, the issuance of publications designed to promote good will and eliminate discrimination, and the proposal of legislation designed to eliminate discrimination. "Clearly, the legislature believed the Act's purposes were to have broad and important implications for the welfare of the Utah Workers." Such a detailed and far-reaching approach to the problem of discrimination, encompassing a wide variety of methods, clearly manifests the legislature's intent to completely blanket the field of employment law in Utah.

Id. at ¶ 12 (internal citations omitted).

The *Gottling* Court also found preemptive intent in the UADA's creation of "an elaborate remedial process," which required an employee alleging discrimination to assert a claim with the Antidiscrimination and Labor Division ("**UALD**") within a set time period; provided for administrative handling of the claim, with the UALD attempting settlement and, if unsuccessful, investigating the claim; and provided for an award of specified (and limited) remedies to a successful complainant–all of which is performed without charge to a complainant. *Id.* ¶ 13.

Like the statutes in *Gilger* and *Gottling*, the UOSH Act also has a field preemptive effect with respect to "conduct covered by the Act . . . ." *See Gilger*, 2000 UT 23, at ¶ 13; *Gottling*, 2000 UT 23, at ¶ 11. In particular, a clear

preemptive intent can be implied from the UOSH Act's structure and purpose. The stated legislative intent of the UOSH Act is "(1) to preserve human resources by providing for the safety and health of workers; and (2) to provide *a coordinated state plan* to implement, establish, and enforce occupational safety and health standards as effective as the standards under the Williams-Steiger Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 651 *et seq*." Utah Code § 34A-6-102 (emphasis added).

Also like the UADA, the UOSH Act "utilizes a variety of tools to accomplish [its] goal." *Gottling*, 2002 UT 95, ¶ 12. The UOSH Act vests jurisdiction in the Utah Labor Commission and the Division to administer the UOSH Act and to establish rules and provisions to carry it into effect. *Id.* § 34A-6-104. It also directs the Division to conduct research and related activities, *id.* § 34A-6-107; collect and analyze occupational safety statistics, *id.* § 34A-6-108; and conduct educational programs. *Id.* § 34A-6-109. It further directs the Division to issue standards for workplace safety requirements, *id.* § 34A-6-202; and directs employers to comply with those standards, as well as rules and orders issued by the Division. In addition, the UOSH Act directs the Division to inspect workplaces and investigate worker injuries, *id.* § 34A-6-301; issue rules requiring employers to report workplace injuries to the Division, *id.*; issue citations for violations, *id.* § 34A-6-302; and petition district courts to restrain dangerous workplace conditions or practices. *Id.* § 34A-6-305.

In furtherance of the UOSH Act's stated purpose and its comprehensive statutory scheme, Section 203 prohibits employers from discharging or retaliating against employees for filing complaints with the Division, participating in proceedings under the UOSH Act, or exercising a right under the UOSH Act. Utah Code § 34A-6-203(1) . And like the UADA, the UOSH Act creates "an elaborate remedial process," *see* *Gottling*, 2002 UT 95, at ¶ 13, which requires an employee alleging retaliation to make a complaint to the Division within a set period (30 days) of an alleged retaliatory act; requires the Division to cause an investigation to be made; and requires the Division, if it finds unlawful retaliation, to issue an order finding a violation of Section 203, requiring that the violation cease, and (permissively) including "other appropriate relief, such as reinstatement of the employee to the employee's former position with back pay." *Id.* § 34A-6-203(2)(c)(i). Either an employer or employee may appeal an order of the Division, first administratively, and then judicially. *Id.* § 34A-6-203(3)(4).

Thus, just as the Utah Dramshop Act in *Gilger* covered the field of negligence-based liability for social hosts providing alcohol, and the UADA in *Gottling* covered the field of employer discrimination, the UOSH Act covers the field of employee retaliation claims. In addition to providing for comprehensive safety and health standards, research, and public education, the UOSH Act expressly prohibits retaliation against employees for exercising rights under

the UOSH Act, and adopts detailed provisions to enforce its prohibition, complete with a specified time period, administrative processing and investigation of complaints, limitations on the damages and penalties that a claimant can recover, and an elaborate administrative and judicial appeals process—and does so without cost to a complainant. Accordingly, the district court correctly concluded that in adopting the UOSH Act, the Utah legislature intended to preempt the field that includes claims of retaliation discharge specifically addressed by the UOSH Act. This Court should not permit Graham to make an "end-run" around the UOSH Act through pursuit of a common law public policy claim, but should affirm the district court's dismissal of that claim with prejudice.

2. The District Court Properly Concluded that Permitting Common Law Wrongful Discharge Claims for Conduct Addressed by the UOSH Act Would Stand as an Obstacle to the Accomplishment and Execution of the Full Purpose and Objectives of the UOSH Act.

Field preemption is also established when a common-law cause of action "may stand as an obstacle to the accomplishment and execution of the full purpose and objectives" of a statutory enactment. *See Gottling*, 2002 UT 95, at ¶ 8 (quoting *Gilger*, 2000 UT 23 at ¶ 11 (quoting *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L.Ed.2d 237 (1996))). In this case, the district court concluded that permitting wrongful discharge claims for conduct explicitly covered by Section 204 would stand as an obstacle

to the accomplishment and execution of the full purpose and objectives of the UOSH Act because it would discourage employees from making administrative claims of retaliatory discharge to the Division in order to pursue broader remedies in court. This conclusion was proper and should be affirmed.

As articulated by the Division in its administrative rule implementing Section 203, "Enforcement of the provisions of Section 34A-6-203 is not only a matter of protecting rights of individual employees, but also of public interest." Utah Admin. Code R614-1-10.K. These interests include the Division's statutory mandate to enforce the provisions of the UOSH Act, including Section 203. Accordingly, a request by an employee to withdraw a complaint of retaliation filed with the Division "will not necessarily result in termination of the Administrator's investigation. The Administrator's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee." *Id.* These interests also include the ability of the Division to conduct workplace inspections and related investigations unfettered by retaliatory conduct by employers. *See* Utah Code §§ 34A-6-104, 34A-6-301. These interests are furthered when the Division receives timely complaints from employees of alleged retaliatory termination or other retaliatory conduct. Accordingly, the UOSH Act requires that complaints of retaliation by employees be made to the Division, and that they be made within 30 days after the retaliatory action. *Id.* § 34A-6-203(2)(a). These requirements allow the Division to investigate

potentially retaliatory conduct promptly and before they become stale, *see* Utah Admin. Code R614-1-10.I.4.b., as well as to detect, remedy, and deter conduct that may thwart or impair Division inspections, investigations, and enforcement actions.

If claims of wrongful discharge in violation of public policy for alleged retaliation in violation of the UOSH Act were permitted, some employees subjected to such retaliation would undoubtedly skip making administrative complaints of retaliation to the Division and proceed directly to court to pursue their individual interests in obtaining broader remedies than those provided by the legislature. Furthermore, some would inevitably do so long after the 30-day period set by the legislature for complaints of retaliatory termination—potentially up to four years after the fact. *See* Utah Code § 78B-2-307. Not only would this be inconsistent with the legislatively determined forms of relief available to successful employees, it would impede the Division's ability to execute the full purpose and objectives of UOSH Act because it would decrease information coming to the Division about conduct potentially indicative of unsafe or unhealthy workplaces or that interferes with Division's ability to perform its statutory mandates of conducting workplace inspections and investigating worker injuries, *id.* § 34A-6-301; enforcing rules requiring employers to report workplace injuries to the Division, *id.*; issuing citations for

violations, *id.* § 34A-6-302; and petitioning district courts to restrain dangerous workplace conditions or practices. *Id.* § 34A-6-305.

3. Graham's Arguments that the District Court Wrongly Found Field Preemption in this Case Are Without Merit.

Graham makes three arguments against the district court's preemption ruling in this Case. First, he argues that the district court did not apply the appropriate legal standards in this case. Opening Brief at 11-17. Second, he argues that the district court did not properly consider his "evidence" against preemption. *Id.* at 17-21. And third, he argues that the limited remedies under Section 203 establish an inference against preemption. *Id.* at 22-24. As set forth below, each of these arguments is without merit.

a. The District Court Applied the Appropriate Legal Standards in This Case.

Graham argues that the district court "failed to allocate the burden of proof to [Albertson's]" and that "it did not find a 'clear and manifest purpose' on the part of the Legislature to pre-empt Mr. Graham's claims." Opening Brief at 15. In support of this argument, Graham notes that "the district court's order provides no express reference to the burden of proof relating to [Albertson's] pre-emption defense," *id.* at 11-12; and asserts that under *State v. Jones,* 958 P.2d 938 (Utah App. 1998), "pre-emption occurs only where there is a 'clear and manifest' to pre-empt expressed by the statutory language

or by implication from the statutory structure and purpose." *Id* at 13-14 (citing *Jones*, 958 P.2d 938 (Utah App. 1998)). Graham also cites to *Wintergreen Group, LC* v. *Utah Dep't of Transportation*, 2007 UT 75, for the proposition that "a legislative intent to pre-empt may not be inferred merely from the comprehensiveness of a statute." *Id* at 14-15.

Graham is correct that the district court's order does not expressly refer to the burden of proof for establishing preemption. The lack of any such explicit reference does not, of course, mean the district court failed to allocate the burden of proof to Albertson's on this issue. Indeed, it is evident from the face of the district court's order that Albertson's met its burden of proof on this issue. In its order, the district court found "that a preemptive intent is implied by the structure and purpose of the UOSH Act," which includes the express statutory purpose of the UOSH Act, the comprehensiveness of the UOSH Act, and the procedures, scheme of regulation, and bureaucratic system created by the UOSH Act to implement its purpose.[7] (R. 0587-0587, at ¶ 3.) These precise considerations were presented to the district court by Albertson's in its opposition to Graham's motion for partial summary judgment (*see* R. 0120-0122, 0127-0129) and in its cross-motion for partial summary judgment. (*See*

[7] Moreover, as set forth in Section I.A., *supra*, the District Court expressly found Graham's claim to be preempted by Section 203 of the UOSH Act under the indispensable element test, which governs in this case. (*See* R. 0587-9588, at ¶ 6.)

R. 0133-0135, 0162-0166.) Similarly, it is of no moment that the district court's order does not recite that it found the preemptive intent of the legislature to be "clear and manifest," as such a conclusion follows from the district court's analysis of the UOSH Act.

Graham's reliance on *Wintergreen Group, LC* v. *Utah Dep't of Transportation* for the proposition that a legislative intent to pre-empt may not be inferred merely from the comprehensiveness of a statute is misplaced. *See* Opening Brief at 14-15. Indeed, *Wintergreen Group* reversed a trial court's dismissal of constitutional counterclaim because the notion of preemption was not conceptually viable in the setting of that case because the case involved "a direct clash between a statute and [a] constitutional claim," rather than a clash between two statutes or a statute and a non-constitutional common law claim. 2007 UT 75, at ¶ 15. As this Court explained in *Wintergreen Group*, "Owing to its different lineage, a constitutional cause of action can never be preempted by statute . . . ." *Id.* at ¶ 14.[8] Thus, *Wintergreen Group* is inapplicable and does not affect the district court's order.

---

[8] Separately, for the sake of accuracy, Albertson's notes that *Wintergreen Group* does not state what Graham paraphrases it as stating. Rather, in dicta discussing the conditions necessary to "extinguish a § 1983 claim … based on an underlying constitutional right," *Wintergreen Group* states that, in that particular context, "the presence of a comprehensive statutory scheme, by itself, 'is not ***necessarily*** sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy.'" *Id.* 2007 UT 75, at ¶ 15.

Last, Graham argues that the district court's conclusion "is based upon an unsupported factual assumption that workers will forego an administrative claim under the UOSH Act to pursue their common law remedy." Opening Brief at 16. This argument also is without merit. The district court's conclusion is not based on "an unsupported factual assumption," but on common sense. And, to the extent the district court's conclusion required anything more from a factual standpoint, it had facts before it (ironically supplied by Graham himself) that supported that conclusion. These facts came in the form of Graham's own declaration submitted in support of his motion for partial summary judgment, in which Graham represented to the district court that his own preference was to pursue a wrongful discharge claim in this case over his administrative complaint because of the broader remedies available under a tort cause of action than provided by the legislature in an administrative complaint under Section 203. (R. 0075-0077, at ¶¶ 12, 13.) Graham's arguments that the district court applied the wrong legal standards in this case are without merit, and the district court's order should be affirmed.

b. Graham's Argument that the District Court Did Not Properly Consider His "Evidence" Against Preemption Is Without Merit.

Graham argues in his Opening Brief that the district court did not properly consider his "evidence" against preemption. Opening Brief at 17-21. Specifically, Graham argues that the district court failed to consider his

arguments that Utah Code section 34A-6-110 and Utah Administrative Code R614-1-10.L evidence a legislative intent against preemption of his wrongful discharge action. This argument is also without merit.

Graham's argument that the district court did not consider Utah Code section 34A-6-110 is based solely on the fact that the district court's order "contains no reference to [that statutory provision]." Opening Brief at 18. Of course, the mere fact that the district court did not cite section 34A-6-110 or explicitly address the merits of Graham's argument about that section does not mean the district court did not consider it. To the contrary, in its order, the district court's expressly acknowledges that Graham had "filed Plaintiff's Second Notice of Supplemental Authority," in which he presented his argument about section 34A-6-110, and then affirmatively states that in issuing its ruling, the district court's "considered the pleadings and submissions of the parties, the arguments of counsel, and the relevant law." (R. 0586.)

In any event, Graham cited no legal authority in his Second Notice of Supplemental Authority in support of the contention that section 110 indicates a legislative intent against the preemption of claims for wrongful termination based on alleged violations of Section 203. Similarly, Graham, cites to no such authority in his Opening Brief in this appeal. Furthermore, section 34A-6-110 is inapplicable on its face to Graham's wrongful discharge claim. The heading

of section 34A-6-110 reads, "Requirements of other laws not limited or repealed–***Worker's Compensation*** or rights under other laws ***with respect to employment injuries*** not affected." Utah Code § 34A-6-110 (emphasis added). Subsection (2) of section 34A-6-110 provides, in turn, as follows:

> Nothing in this chapter shall be construed or held to supersede or in any manner affect ***workers' compensation*** or enlarge or diminish or affect the common law or statutory rights, duties, or liabilities of employers and employees under any law ***with respect to injuries, occupational or other diseases, or death*** of employees arising out of, or in the course of employment.

Id. § 34A-6-110(2) (emphasis added). The plain language of section 34A-6-110 indicates that it was intended to prevent anything within the UOSH Act from disturbing the then-existing elaborate body of statutory and common law relating to the rights of employees, employers, and third parties for ***injuries, diseases, or death*** of employees arising out of or in the course of employment. Context demonstrates that the term "injuries" in this provision refers to physical or mental injuries on the job. This context includes the provision's express references to "workers' compensation," "employers and employees," and "injuries, occupational, or other diseases, or death of employees." *Id.* It is further demonstrated by the limiting phrase "arising out of, or in the course of employment," which was (and still is) an established term of art used (with minor variations over the years) in the Utah Workers' Compensation Act and the construed by numerous judicial decisions as of 1973, when the UOSH Act

was enacted. *See, e.g.*, *M & K Corp. v. Indus. Comm'n*, 189 P.2d 132, 133–34 (Utah 1948) (construing term "arising out of or in the course of employment" as used in then-section 42–1–43 (1943)); *Andreason v. Indus. Comm'n*, 100 P.2d 202, 204 (Utah 1940), reh'g denied, 102 P.2d 894 (construing same term, as used in then-Utah Code §§ 42-1-42, 42-1-43 (1933)); *Chase v. Indus. Comm'n*, 17 P.2d 205 (Utah 1932) (construing same term, as used in Laws Utah 1921, chap. 67, § 3112); *Grasteit v. Indus. Comm'n*, 290 P. 764, 768 (Utah 1930) (discussing same term, as used in Comp. Laws 1917, § 3112, as amended); *Ocean Accident & Guar. Corp. v. Indus. Comm'n*, 245 P. 343 (Utah 1926) (same); *Westerdahl v. State Ins. Fund*, 208 P. 494 (Utah 1922) (same); *Pinyon Queen Mining Co. v. Indus. Comm'n*, 204 P. 323 (1922) (same). And, as more recently decided by this Court in *Touchard v. La-Z Boy Inc.*, the termination of an employee's employment does not fall within the scope of this term. 2006 UT 71, ¶ 24 (holding that cause of action for wrongful discharge does not fall within the exclusive remedy provision of the Utah Workers' Compensation Act).

Graham's assertion that the district court did not properly consider his argument under Utah Administrative Code R614-1-10.L is similarly without merit. Indeed, the district court not only considered this argument, it explicitly rejected it because the court's "reading of that provision is that it applies to arbitration and other agency proceedings, and it does not change the Court's

reading of the UOSH Act as it relates to a common-law tort claim, such as the one at issue here." (R. 0587, at ¶ 4.) Further, the district court's reading of R614-1-10.L is correct. R614-1-10.L, captioned "Arbitration or other agency proceedings" acknowledges the reality that, concurrently with filing a complaint under Section 203, an employee may also pursue remedies "under grievance arbitration proceedings in collective bargaining agreements" or may resort to "other agencies" for relief, "such as the National Labor Relations Board." *See* Utah Admin. Code R614-1-10.L.1. The rule further states the principles used by the Division in such circumstances to balance the exercise of its independent jurisdiction to investigate and determine Section 203 complaints with the policy favoring voluntary resolution of disputes "under procedures in collective bargaining agreements" and the principle of paying due deference to the jurisdiction of "other agencies," established to resolve disputes that may also be related to Section 203 complaints. *Id.* R614-1-10.L.2. Nothing in the rule indicates that it applies to the pursuit of tort claims in private civil lawsuits. Separately, as R614-1-10.L is an administrative rule issued by an administrative agency, and not a statute or other pronouncement by the legislature, it provides no evidence of legislative intent. Accordingly, the district court properly rejected R614-1-10.L as "evidence" of legislative intent that the UOSH Act not preempt private causes of action based on conduct expressly addressed by Section 203.

c. Graham's Contention that the Limited Remedies Under Section 203 Establish an Inference Against Pre-Emption Is Incorrect.

Graham's final argument on appeal is that the limited remedies available under Section 203 "establish an inference against pre-emption." Opening Brief at 22. Notably, Graham does not cite any legal authority in support of this argument. This is understandable, as Utah law on preemption is decidedly to the contrary and makes clear that the extent of the remedies available under a statute (or whether a statutory remedy is available at all) is relevant only to a determination of which test of statutory preemption applies, not to whether a statute preempts a common-law cause of action. In those situations where a statute supplies a remedy, "the indispensable element test is the correct analytical model for determining whether a statutory cause of action forecloses a common law remedy." *Retherford*, 844 P.2d at 963. In other situations, the broader field preemption test applied by this Court in *Gilger* and *Gottling* applies. *See Gilger*, 2000 UT 23, at ¶¶ 9-11; *Gottling*, 2002 UT 95, ¶¶ 9-13.

In either situation, if the requirements of the applicable test are met, a common law remedy is preempted regardless of whether the result leaves a particular plaintiff with a lesser remedy—or none at all. As made clear by *Retherford*, in the situation where a statute provides a remedy, if the requirements of the indispensable element test are met, a common law claim

is preempted without regard to whether the statutory remedy is as generous than an argued-for common law remedy. That was the precise situation in *Retherford*, where the recovery available under the statute at issue (the UADA) was less generous and the time period for bringing a claim was shorter than at common law in tort. Indeed, the *Retherford* Court observed that the very reason the plaintiff in that case had asserted a common-law wrongful discharge cause of action instead of a claim under the UADA was precisely *because* she preferred the broader remedies and the more generous time periods available under the common-law claim. *Retherford*, 844 P.2d at 961 ("Retherford argues that the UADA has no preemptive effect because she hopes to avoid its provisions and pursue her common law remedies.). Nonetheless, this Court held her common law claim preempted by the UADA. *Id.* at 966-967.

Similarly, under the field preemption test applied *Gottling*, this Court held that the UADA bars all common-law remedies for employment discrimination, even in situations where the UADA offers *no remedy whatsoever* to employees because they are employed by employers with less than 15 employees, which are not subject to the prohibitions of the UADA. 2002 UT 95, ¶¶20, 21. Thus, the fact that a statute provides more limited remedies for an injury than those available at common law, or that it may

provide no remedy at all for a particular plaintiff, has no bearing on whether a common law cause of action is preempted.

CONCLUSION

As set forth above, the district court properly held Graham's wrongful discharge claim preempted under the indispensable element test adopted by this Court in *Retherford*. Graham does not directly challenge, or even address, this holding. Rather, Graham ignores it and seeks to avoid preemption solely by challenging the district court's alternative holding that his claim is preempted by the more generally applicable preemption analysis applied by this Court in *Gottling*. Graham should not be permitted to do so.

The indispensable element test is a specialized test adopted by this Court for the precise circumstances here—where a statute addresses an injury that is an indispensable element of a cause of action asserted by a plaintiff. *Retherford*, 844 P.2d at 964-966; *see* *Gilger*, 2000 UT 23 at ¶¶ 10, 11 n.1; *Gottling*, 2002 UT 95 ¶ 8, n.1. As set forth above, the UOSH Act specifically addresses discharge in retaliation for exercising a right under the UOSH Act, and this injury is an indispensable element of Graham's claim of wrongful discharge in violation of the public policy embodied in the UOSH Act against retaliation for exercising a right under the UOSH Act. Graham's claim is therefore preempted by the UOSH Act.

Graham's claim is similarly preempted under the more generally applicable preemption analysis set forth in *Gilger* and *Gottling*. *See* Gilger, 2000 UT 23 at ¶¶ 11-13; *Gottling*, 2002 UT 95 ¶¶ 8-14. As discussed above, a preemptive intent is implied by the structure and purpose of the UOSH Act—both in the pervasiveness of its provisions relating to retaliation and in the fact that recognition of Graham's cause of action would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the UOSH Act.

Graham seeks to proceed in tort for the admitted reason that his potential recovery in tort is more generous than that under the UOSH Act. This is irrelevant, however, to the question of preemption, and Graham should not be permitted to circumvent the express remedy for alleged retaliatory discharge provided by the UOSH Act. Accordingly, this Court should affirm the district court's ruling and remand this case for further proceedings below.

DATED this 1st day of July 2019.

/s/ Mark A. Wagner

Attorneys for Defendant-Appellee Albertson's, LLC.

CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Rule 24(f)(1) of the Utah Rules of Appellate Procedure, this brief contains 10,041 words, excluding the table of contents, table of authorities, addendum, and certificates of counsel. I further certify that in compliance with Rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook 13 point font. Finally, I certify, in accordance with Rule 24(a)(11)(B), that this brief complies with Rule 21 of the Utah Rules of Appellate Procedure.

/s/ Mark A. Wagner

Attorney for Defendant-Appellee
Albertson's, LLC

ADDENDUM

Item 1: Utah Code § 34A-5-203

Effective 5/10/2016

34A-6-203 Discharge or retaliation against employee prohibited.

(1) A person may not discharge or in any way retaliate against an employee because the employee:

(a) files a complaint or institutes or causes to be instituted a proceeding under or related to this chapter;

(b) testifies or is about to testify in any proceeding under or related to this chapter; or

(c) exercises a right granted by this chapter on behalf of the employee or others.

(2)

(a) An employee who believes that the employee has been discharged or otherwise retaliated against by any person in violation of this section may, within 30 days after the violation occurs, file a complaint with the division alleging discharge or retaliation in violation of this section.

(b)

(i) Upon receipt of the complaint, the division shall cause an investigation to be made.

(ii) The division may employ investigators as necessary to carry out the purpose of this Subsection (2).

(c) Upon completion of the investigation, the division shall issue an order:

(i)

(A) finding a violation of this section has occurred;

(B) requiring that the violation cease; and

(C) which may include other appropriate relief, such as reinstatement of the employee to the employee's former position with back pay; or

(ii) finding that a violation of the section has not occurred.

(d) An order issued under Subsection (2)(c) is the final order of the commission unless a party to the claim of a violation of this section seeks further review as provided in Subsection (3).

(3)

(a) A party to a claim of a violation of this section may seek review of the order issued under Subsection (2)(c) within 30 days from the date the order is issued by filing a request for review with the Division of Adjudication.

(b) The request for review shall comply with Subsection 63G-4-301(1).

(c) If the request for review is made, the Division of Adjudication shall conduct a de novo review of the underlying order.

(d) If the request for review is based on a finding that a violation of this section occurred, the division shall appear in the review proceeding to defend the division's finding.

(e) If the request for review is based on a finding that a violation of this section did not occur, the division may not participate in the review proceeding.

(f)

(i) If the Division of Adjudication determines a violation of this section has occurred, it may order relief as provided in Subsection (2)(c).

(ii) If the Division of Adjudication determines that a violation of this section has not occurred, it shall issue an order stating the determination.

(4) A party may appeal an order issued by the Division of Adjudication under Subsection (3)(f) in accordance with Subsection 34A-6-304(1).

Amended by Chapter 67, 2016 General Session

Item 2: Utah Code § 34A-5-110

34A-6-110 Requirements of other laws not limited or repealed -- Worker's compensation or rights under other laws with respect to employment injuries not affected.

(1) Nothing in this chapter is deemed to limit or repeal requirements imposed by statute or otherwise recognized by law.

(2) Nothing in this chapter shall be construed or held to supersede or in any manner affect workers' compensation or enlarge or diminish or affect the common-law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, occupational or other diseases, or death of employees arising out of, or in the course of employment.

Renumbered and Amended by Chapter 375, 1997 General Session

Item 3: Utah Admin Code R614-1-10

R614-1-10. Discrimination.

A. General.

1. The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of work places, and record keeping requirements. Enforcement procedures initiated by the Commission; review proceedings as required by Title 63G, Chapter 4, Administrative Procedures Act; and judicial review are provided by the Act.

2. This rule deals essentially with the rights of employees afforded under section 34A-6-203 of the Act. Section 34A-6-203 of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

3. The purpose is to make available in one place interpretations of the various provisions of Section 34A-6-203 of the Act which will guide the Administrator in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

B. Persons prohibited from discriminating.

Section 34A-6-203 defines employee protections under the Act, because the employee has exercised rights under the Act. Section 34A-6-103(11) of the Act defines "person". Consequently, the prohibitions of Section 34A-6-203 are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 34A-6-203 would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. (See, Meek v. United States, F. 2d 679 (6th Cir., 1943); Bowe v. Judson C. Burnes, 137 F 2d 37 (3rd Cir., 1943).)

C. Persons protected by section 34A-6-203.

1. All employees are afforded the full protection of Section 34A-6-203. For purposes of the Act, an employee is defined in Section 34A-6-103(6). The Act does not define the term "employ". However, the broad remedial nature of this legislation demonstrates a clear legislative intent that the existence of an employment relationship, for purposes of Section 34A-6-203, is to be based upon economic realities rather than upon common law doctrines and concepts. For a similar interpretation of federal law on this issue, see, U.S. v. Silk, 331 U.S. 704 (1947); Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947).

2. For purposes of Section 34A-6-203, even an applicant for employment could be considered an employee. (See, NLRB v. Lamar Creamery, 246 F. 2d 8 (5th Cir., 1957).) Further, because Section 34A-6-203 speaks in terms of any employee, it is also clear that

the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

3. In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would be within the coverage of Section 34A-6-203.

D. Unprotected activities distinguished.

1. Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of Section 34A-6-203 apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. (See, NLRB v. Dixie Motor Coach Corp., 128 F. 2d 201 (5th Cir., 1942).)

2. To establish a violation of Section 34A-6-203, the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, Section 34A-6-203 has been violated. (See, Mitchell v. Goodyear Tire and Rubber Co., 278 F. 2d 562 (8th Cir., 1960); Goldberg v. Bama Manufacturing, 302 F. 2d 152 (5th Cir., 1962).) Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

E. Specific protections-complaints under or related to the Act.

1. Discharge of, or discrimination against an employee because the employee has filed "any complaint under or related to this Act" is prohibited by Section 34A-6-203. An example of a complaint made "under" the Act would be an employee request for inspection pursuant to Section 34A-6-301(6). However, this would not be the only type of complaint protected by Section 34A-6-203. The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. ((See Cong. Rec., vol. 116 P. 42206 December 17, 1970).)

2. Complaints registered with Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

3. Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

F. Proceedings under or related to the act.

1. Discharge of, or discrimination against, any employee because the employee has exercised the employee's rights under or related to this Act is also prohibited by Section 34A-6-203. Examples of proceedings which would arise specifically under the Act would be inspections of work-sites under Section 34A-6-301 of the Act, employee contest of abatement date under Section 34A-6-303 of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under Section 34A-6-202 of the Act and Title 63G, Chapter 3, employee application for modification of revocation of a variance under Section 34A-6-202(4)(c) of the Act and R614-1-9., employee judicial challenge to a standard under Section 34A-6-202(6) of the Act, and employee appeal of an order issued by an Administrative Law Judge, Commissioner, or Appeals Board under Section 34A-6-304. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in R614-1-10.G. would also be applicable.

2. An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

G. Testimony.

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act is also prohibited by Section 34A-6-203. This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, and administrative rulemaking or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

H. Exercise of any right afforded by the Act.

1. In addition to protecting employees who file complaints, institute proceedings under or related to the Act it also prohibited by Section 34A-6-203 discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (34A-6-303).

Certain other rights exist by necessary implications. For example, employees may request information from the Utah Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Administrator in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

2. Review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to Section 34A-6-301 of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of Section 34A-6-203 by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

a. Occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

I. Procedures - Filing of complaint for discrimination.

1. Who may file. A complaint of Section 34A-6-203 discrimination may be filed by the employee himself, or by a representative authorized to do so on his behalf.

2. Nature of filing. No particular form of complaint is required.

3. Place of filing. Complaint should be filed with the Administrator, Division of Occupational Safety and Health, Labor Commission, 160 East 300 South, Salt Lake City, Utah 84114-6650, Telephone 530-6901.

4. Time for filing.

a. Section 34A-6-203(2)(b) provides protection for an employee who believes that he has been discriminated against.

b. A major purpose of the 30-day period in this provision is to allow the Administrator to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.

c. However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; where the employee has, within the 30-day period, resorted in good faith to grievance-arbitration proceedings under a collective bargaining agreement or filed a complaint regarding the same general subject with another agency; where the discrimination is in the nature of a continuing violation. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

J. Notification of administrator's determination.

The Administrator is to notify a complainant within 90 days of the complaint of his determination whether prohibited discrimination has occurred. This 90-day provision is considered directory in nature. While every effort will be made to notify complainants of the Administrator's determination within 90 days, there may be instances when it is not possible to meet the directory period set forth in this section.

K. Withdrawal of complaint.

Enforcement of the provisions of Section 34A-6-203 is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the Administrator's investigation. The Administrator's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

L. Arbitration or other agency proceedings.

1. An employee who files a complaint under Section 34A-6-203(2) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Administrator's jurisdiction to entertain Section 34A-6-203 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Administrator may file action in district court

regardless of the pendency of other proceedings.

2. However, the Administrator also recognizes the policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. (See, e.g., Boy's Market, Inc. v. Retail Clerks, 398 U.S. 235 (1970); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Carey v. Westinghouse Electric Co., 375 U.S. 261 (1964); Collier Insulated Wire, 192 NLRB No. 150 (1971).) By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to Section 34A-6-203 complaints.

3. Where a complainant is in fact pursuing remedies other than those provided by Section 34A-6-203, postponement of the Administrator's determination and deferral to the results of such proceedings may be in order. (See, Burlington Truck Lines, Inc., v. U.S., 371 U.S. 156 (1962).)

4. Postponement of determination. Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under Section 34A-6-203 and those proceedings are not likely to violate the rights guaranteed by Section 34A-6-203. The factual issues in such proceedings must be substantially the same as those raised by Section 34A-6-203 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination. (See, Rios v. Reynolds Metals Co., F. 2d (5th Cir., 1972), 41 U.S.L.W. 1049 (October 10, 1972): Newman v. Avco Corp., 451 F. 2d 743 (6th Cir., 1971).)

5. Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis, after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicative hearing thereof, such dismissal will not ordinarily be regarded as determinative of the Section 34A-6-203 complaint.

M. Employee refusal to comply with safety rules.

Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by Section 34A-6-203. This situation should be distinguished from refusals to work, as discussed in R614-1-10.H.

Item 4: Order Denying Plaintiff's Motion for Partial Summary Judgment, Granting Defendant's Cross-Motion for Partial Summary Judgment, and Denying Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth (October 12, 2018)

The Order of the Court is stated below:
Dated: October 12, 2018 03:04:57 PM
/s/ HEATHER BRERETON
District Court Judge

Mark A. Wagner (#6353)
Prince, Yeates & Geldzahler, P.C.
15 West South Temple, No. 1700
Salt Lake City, Utah 84101
Telephone: (801) 524-1000
Email: mwagner@princeyeates.com
Attorneys for Defendant Albertson's, LLC.

IN THE THIRD DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH	
STEVEN ERIC GRAHAM, Plaintiff, vs. ALBERTSON'S, LLC, Defendant.	**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO PERFORM DISCOVERY RELATED TO DEFENDANT'S WEALTH** Case No. 180900781 Judge: Heather Brereton

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment and supporting Declaration of Steven Eric Graham filed April 17, 2018, and on Albertson's Cross-Motion for Partial Summary Judgment filed May 8, 2018. Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on May 8, 2018; plaintiff filed a Combined Reply Memorandum in Support of Motion for Partial Summary Judgment and Memorandum in Opposition to Defendant's Cross-Motion for Partial Summary Judgment on May 17, 2018; defendant filed a Reply Memorandum in Support of Albertson's

Cross-Motion for Partial Summary Judgment on May 24, 2018; and Plaintiff filed a Notice of Supplemental Authority on July 30, 2018. The Court heard oral argument on the foregoing motions on September 7, 2018. Plaintiff was represented at oral argument by Kenneth B. Grimes and defendant was represented by Mark A. Wagner. After oral argument, the Court took the foregoing motions under advisement. Thereafter, plaintiff filed Plaintiff's Second Notice of Supplemental Authority on September 21, 2018. Having considered the pleadings and submissions of the parties, the arguments of counsel, and the relevant law, **the court issued an oral ruling on the motions on September 26, 2018. The court hereby incorporates that oral ruling** and for the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Albertson's Cross-Motion for Partial Summary Judgment is **GRANTED**. In addition, as a result of the foregoing rulings, Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is **DENIED** as moot.

1. Both parties relied on essentially the same statement of material facts for the purposes of their cross-motions for partial summary judgment. Accordingly, there are no genuine issues of material fact that would preclude the entry of summary judgment.

2. The parties' cross-motions for partial summary judgment raise the same legal issue; that is, whether plaintiff's claim for wrongful discharge in violation of public policy is preempted by the Utah Occupational Safety and Health Act ("**UOSH Act**").

3. The Court finds that the UOSH Act preempts plaintiff's claim for wrongful discharge in violation of public policy. This finding is based on the Court's analysis of the UOSH Act itself. Although the UOSH Act does not contain an express exclusive remedy

provision, when examining the legislative intent behind the UOSH Act, the court finds that in passing the UOSH Act, the legislature put in place a comprehensive piece of legislation to provide for the safety and health of workers and provided a coordinated plan to establish standards to do so. The Court finds that a preemptive intent is implied by the structure and purpose of the UOSH Act. The UOSH Act establishes standards, procedures, a scheme of regulation, and a bureaucratic system to implement its aims in a timely and cost-effective approach.

4. The Court's notes plaintiff's argument that Utah Administrative Code rule R614-1-10.L indicates that the legislature did not intend to preempt his tort claim, in that that administrative code provision provides for a postponement of the Administrator's determination in circumstances where other proceedings are ongoing and for deferral to the results of such proceedings. The Court's reading of that provision is that it applies to arbitration and other agency proceedings, and it does not change the Court's reading of the UOSH Act as it relates to a common-law tort claim, such as the one at issue here.

5. The Court further finds that allowing plaintiff's common-law tort claim runs counter to the purpose of the UOSH Act in that it could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided for under the UOSH Act, and that claims under the UOSH Act address the concerns not only of individual employees but also the broader purpose of providing for the safety and welfare of all workers through the broader regulatory structure of the UOSH Act.

6. The Court further finds that when it analyzes plaintiff's common-law claim in this action, the UOSH Act provides the public policy supporting his common-law claim, and it establishes a procedure and remedy to address his claim, which is retaliation or discharge for reporting a workplace injury in violation of the UOSH Act. As such, the Court finds that the claim at issue comes within the scope of the UOSH Act's preemptive effect. The Court comes to this conclusion based on the indispensable element test set forth in *Retherford v. AT&T Communications* of *Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). In applying this test, preemption depends on the nature of the injury for which the plaintiff makes the claim. Here, in Utah Code section 34A-6-203, the UOSH Act specifically addresses retaliation or discharge as a result of reporting a workplace injury, the very injury claimed by plaintiff in this action. The Court finds that the UOSH Act establishes a procedure for reporting and investigating a claim of retaliation and discharge, a forum to issue a decision or order, a remedy, and a procedure for review and appeal of that order. Further, in claiming discharge in violation of public policy in his tort claim, plaintiff relies on the UOSH Act as the statement of public policy. In the absence of the UOSH Act, plaintiff would be unable to make out his common-law claim. As such, the Court finds that the harm the UOSH Act addresses is an indispensable element of plaintiff's tort cause of action and, therefore, the UOSH Act preempts plaintiff's common-law claim here.

7. For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Albertson's Cross-Motion for Partial Summary Judgment is **GRANTED**. Plaintiff's claim for wrongful discharge in violation of public policy is therefore **DISMISSED WITH PREJUDICE**.

8. The only claim asserted by plaintiff in this action that would support a potential recovery of punitive damages is plaintiff's claim for wrongful discharge in violation of public policy. Because that claim is dismissed, the Court finds that Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is moot. Accordingly, Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is **DENIED**.

----------**END OF ORDER** ----------
signature and date appear at the top of the first page

Approved as to form:

/s Kenneth B. Grimes (*by Mark A. Wagner with approval of Kenneth Grimes by email*)
Kenneth B. Grimes
Attorney for Plaintiff

4827-1824-2678, v. 2

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2019, I caused to be served to the counsel listed below an electronic copy of the foregoing by email, and that I will also cause two copies of the same to be served to counsel by mail.

Kenneth B. Grimes
Law Offices of Kenneth B. Grimes
480 East 400 South, Suite 203
Salt Lake City, Utah 84111
Telephone: 801-359-4212
kglawyerutah@gmail.com

Attorneys for Defendant-Appellant
Steven Eric Graham

/s/ Mark A. Wagner

Attorney for Defendant-Appellee
Albertson's, LLC